No. 126, Original

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF KANSAS,
Plaintiff,

v.

STATE OF NEBRASKA

and

STATE OF COLORADO,

Defendants.

STATE OF COLORADO'S RESPONSE TO THE STATE OF KANSAS' MOTION FOR LEAVE TO FILE PETITION

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COMES NOW the State of Colorado by and through counsel and pursuant to Supreme Court Rule 17(5) and submits this Response to the State of Kansas' Motion for Leave to File Petition.

STATEMENT OF POSITION

The State of Kansas has specifically not made any direct claims against the State of Colorado as part of its Petition at this time. Petition, *Kansas v. Nebraska and Colorado*, No. 126, Original (May 2010) ¶ 14. Therefore, the State of Colorado need not respond directly to any of Kansas' allegations and takes no position on whether the Court should take the Petition. However, Colorado files this Response in order to provide additional information to the Court so the Court may be more fully cognizant of the history and prior proceedings relating to Kansas' current claims against the State of Nebraska.

STATEMENT OF THE CASE

1. Previous Litigation

The States of Colorado, Kansas and Nebraska have previously litigated disputes regarding the Republican River Compact ("Compact"), Pub. Law 60, 78th Congress, 57 Stat. 86, codified at C.R.S. § 37-67-101 (2009) before the Court. That action commenced when the Court granted Kansas' Motion for Leave to File a Bill of Complaint. *Kansas v.*

Nebraska and Colorado, 525 U.S. 1101 (1999). The touchstone of Kansas' Complaint was that the State of Nebraska had breached its duties under the Compact by withdrawing groundwater hydrologically connected to surface streams in the Republican River Basin, thereby consuming more water than allocated to Nebraska by the Compact. Kansas Bill of Complaint, *Kansas v. Nebraska and Colorado*, No. 126, Original at 5.

After accepting the Complaint, the Court appointed Vincent McKusick as Special Master. Under the Special Master's direction, the three States briefed the threshold legal issue raised by Nebraska's Motion to Dismiss: do the allocations to the States under the Republican River Compact include groundwater? In answering that question, Special Master McKusick recommended:

> The Republican River Compact restricts a compacting State's consumption of groundwater to the extent the consumption depletes stream flow in the Republican River Basin and, therefore, Nebraska's Motion to Dismiss should be denied.

First Report of the Special Master (Subject: Nebraska's Motion to Dismiss), *Kansas v. Nebraska and Colorado*, No. 126, Original (January 28, 2000) at 45.

Soon after this initial ruling, the three States requested, and the Special Master granted, a stay of the proceedings so that the States could pursue a

mediated settlement of all pending claims. Second Report of the Special Master (Subject: Final Settlement Stipulation), *Kansas v. Nebraska and Colorado*, No. 126, Original (April 15, 2003) at 1. Over the course of the next year, the States, with the participation of the United States as *amicus curiae*, negotiated and executed the Final Settlement Stipulation. *Id.* In the Final Settlement Stipulation, the States agreed that all claims, counterclaims and cross-claims for which leave to file was or could have been sought in that case prior to December 15, 2002 were dismissed with prejudice, effective upon the completion and acceptance of a groundwater model of the Republican River Basin. *Id.* The States completed the groundwater model and the Republican River Compact Administration ("RRCA")[1] adopted the groundwater model in accordance with the conditions of the Final Settlement Stipulation. Final Report of the Special Master with Certificate of Adoption of RRCA Groundwater Model, *Kansas v. Nebraska and Colorado*, No. 126, Original (September 17, 2003) at 3. This Court then dismissed the original action. *Kansas v. Nebraska and Colorado*, 538 U.S. 720 (2003).

The Final Settlement Stipulation contained several provisions in addition to dismissal of all claims with prejudice and the requirement to construct and adopt a groundwater model.

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1 The Republican River Compact Administration is made up of a representative from each of the three States, is responsible for Compact administration, and requires unanimity to act. Republican River Compact, art. IX.

Relevant here, the States agreed to a mandatory, non-binding dispute resolution process in an attempt to resolve future disputes without resorting to litigation before this Court.

The Final Settlement Stipulation provides that any matter relating to Republican River Compact administration shall first be submitted to the RRCA for its consideration. Final Settlement Stipulation, *Kansas v. Nebraska and Colorado*, No. 126, Original (April 15, 2003), ¶ VII.A.1. The State raising the issue may proceed through the dispute resolution process under either a "fast-track" or "regular" track. *Id.*, ¶¶ VII.A.3 and A.4. As is apparent from the designation, the RRCA must address fast-track issues on an accelerated schedule as compared to regular issues. *Id.*, ¶ VII.A.5. If the RRCA is unable to resolve a dispute by unanimous vote, the State raising the dispute may proceed to non-binding arbitration, or, if all States agree, to binding arbitration. *Id.*, ¶ VII.A.7. The arbitration will then proceed according to the schedules agreed to by the States under either the fast-track or regular designation. *Id.*, ¶¶ VII.B. C and D. At the conclusion of the arbitration, the arbitrator shall issue a written report and each State shall give written notice to the other States and the United States as to whether they will accept, accept and reject in part, or reject the arbitrator's decision. *Id.*, ¶ VII.B.6.

The Final Settlement Stipulation also established a general test for each State's Compact compliance based upon a 5-year running average. *Id.* ¶ IV.D. However, under certain circumstances

directly relating to the projected or actual supply of water available for irrigation in Harlan County Lake, known as water-short year administration, Nebraska's Compact compliance may be determined on either a 2-year or a 3-year running average. *Id.* ¶¶ V.B.2.e.i and 2.e.i.

2. The Present Dispute

Despite the efforts taken by Nebraska after the Final Settlement Stipulation, Nebraska continued to consume more water than it was allocated under the Compact. By letter dated February 8, 2008, Kansas raised the issue of Nebraska's non-compliance by submitting the issue to the RRCA as a fast-track issue. Statement of Colorado State Engineer Dick Wolfe, Appendix A to this Response ("Statement"), ¶ 4. There, Kansas requested a proposed remedy for Nebraska's over-use including entry of an order by the Supreme Court finding Nebraska in violation of the Court's Decree, a monetary award to Kansas from Nebraska and certain specific actions to be taken by Nebraska to reduce Nebraska's consumptive use under the Compact. *Id.* Nebraska, by letter dated April 15, 2008, submitted additional issues to the RRCA regarding proposed changes to the RRCA Accounting Procedures, FSS App. C, and requested that the RRCA make various changes to the Accounting Procedures. Statement, ¶ 5.

On May 16, 2008, the RRCA addressed the Kansas and Nebraska issues in accordance with the Dispute Resolution procedures of the FSS, but the RRCA was not able to resolve the dispute.

Statement, ¶ 6. The States of Kansas and Nebraska then each invoked the non-binding arbitration procedures of the FSS. Statement, ¶ 7. The three States agreed on an arbitrator and an arbitration schedule and proceeded through an evidentiary hearing before an arbitrator who issued non-binding written findings. *Id.* Most relevant here, the arbitrator ruled against Kansas, finding that Kansas had not met its burden of proof regarding Kansas' claimed damages, although the arbitrator did recommend an award of $10,000 in nominal damages to Kansas for Nebraska's over-use of water. Statement, ¶ 8. Kansas then notified Colorado and Nebraska in writing that it would not accept the recommendations of the arbitrator. Statement, ¶ 9. Thus Kansas is deemed to have exhausted its administrative remedies with regard to all issues raised in that particular dispute resolution process. FSS ¶ VII.B.8

Since the conclusion of the previous dispute resolution process, the States have again invoked the process in an effort to resolve other disputes among the States. Currently, the three States are engaged in two simultaneous non-binding arbitrations. Statement, ¶ 10. The first regards a proposal by Colorado to construct and operate an augmentation pipeline pursuant to FSS ¶ III.B.1.k to assist Colorado in meeting its Compact obligations. In the second, Nebraska has raised the issue of what effect, if any, the payment of damages for past violations of the Compact will have on the future calculation of that State's Compact Compliance under the applicable running averages of the FSS. See, FSS ¶¶ IV.D, V.B.2.e.i or 2.e.ii. The dispute resolution

process for those issues is proceeding simultaneously and under the present time frame designation will conclude on November 1, 2010 when the States will give written notice as to whether they will accept, accept and reject in part, or reject the arbitrator's decision pursuant to FSS ¶ VII.B.7.

ARGUMENT

The Court evaluates two factors in determining whether it will grant a motion for leave to file. The first is "the nature of the interest of the complaining State, focusing on the seriousness and dignity of the claim." *Mississippi v. Louisiana*, 506 U.S. 73, 77 (1992) [interior citations and quotation marks omitted]. For the second factor, the Court will explore "the availability of an alternative forum in which the issue tendered can be resolved." *Id.*

Kansas has alleged a violation of the Republican River Compact and the Final Settlement Stipulation, as approved by the Court. *Kansas v. Nebraska and Colorado*, 538 U.S. 720. As Kansas has made no specific allegations against Colorado, Colorado will not address those allegations or whether the facts as alleged by Kansas in the Petition are of sufficient seriousness and the claim of sufficient dignity for the Court to grant the Motion for Leave. However, as shown above, Kansas has complied with the dispute resolution process of the Final Settlement Stipulation and is deemed to have exhausted its administrative remedies with regard to the specific issues raised in the Motion for Leave.

Therefore, the dispute resolution process is no longer an available forum to resolve these issues.

CONCLUSION

For the reasons set forth above, Colorado takes no position as to whether the Kansas' Motion for Leave to File Petition should be granted. However, the Court should be aware that Colorado and Nebraska have invoked the dispute resolution process pursuant to the Final Settlement Stipulation, and, if the Court grants Kansas' Motion for Leave, any of the States may seek to have the Court expand the scope of issues to be decided in the matter.

Respectfully submitted by:

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July 2010

APPENDIX A

Statement
Of
Colorado State Engineer Dick Wolfe

COMES NOW, Dick Wolfe, pursuant to 28 U.S.C. § 1746, and states as follows:

1. I am the State Engineer for the State of Colorado and Director of the Colorado Division of Water Resources.

2. I am a licensed professional engineer, and, as Colorado State Engineer, I have principal responsibility for the administration of water in Colorado and represent the State of Colorado on several interstate water compact administrations to which Colorado is a party, including the Republican River Compact Administration ("RRCA").

3. I was appointed State Engineer in November 2007 and have been employed by the Colorado Division of Water Resources since 1993. My statements herein are based upon my personal knowledge and my review of the files and documents within my office.

4. By letter dated February 8, 2008, Kansas submitted the issue of Nebraska's over-use of water under the Republican River Compact to the RRCA as a fast-track issue in accordance with the procedures of the Final Settlement Stipulation, *Kansas v. Nebraska and Colorado*, No. 126, Original (April 15, 2003) ("FSS"). In that letter, Kansas requested as a proposed remedy for Nebraska's over-use the entry of an order by the Supreme Court finding Nebraska in violation of the Court's Decree, a

monetary award, and specific actions to be taken by Nebraska to reduce Nebraska's consumptive use under the Compact.

5. By letter dated April 15, 2008, Nebraska submitted issues regarding proposed changes to the RRCA Accounting Procedures and requested the RRCA make various changes to those Accounting Procedures as fast-track issues in accordance with the FSS.

6. On May 16, 2008, the RRCA addressed the Kansas and Nebraska issues in accord with the Dispute Resolution procedures of the FSS, but the RRCA was not able to resolve the dispute.

7. Subsequent to the RRCA's action, the States of Kansas and Nebraska each invoked the non-binding arbitration procedures of the FSS. The three States agreed to an arbitrator and an arbitration schedule and proceeded through an evidentiary hearing before the arbitrator who issued written findings.

8. As part of those written findings, the arbitrator ruled that Kansas had not met its burden of proof regarding Kansas' claimed damages, but did recommend an award of $10,000 in nominal damages to Kansas from Nebraska for Nebraska's over-use of water.

9. Kansas notified Colorado and Nebraska in writing within the applicable time period that it would not accept the recommendations of the arbitrator.

10. There are two additional issues proceeding through the FSS mandated dispute resolution process at this time. Those issues are proceeding on a contemporaneous schedule. The first issue was raised by

Colorado and is a proposal by Colorado to construct and operate an augmentation pipeline pursuant to FSS ¶ III.B.1.k to assist Colorado in meeting its Compact obligations. The second issue, raised by Nebraska, is what effect, if any, the payment of damages for past Compact violations has on the calculation of that State's Compact Compliance under the applicable running average. The present time frame designation for these issues concludes on November 1, 2010 when each State will give written notice as to whether it will accept, accept and reject in part, or reject the arbitrator's decision.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on June 30, 2010.

/s/Dick Wolfe
Dick Wolfe